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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-715

UNITED STATES OF AMERICA,
Petitioner,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY and UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents.

BRIEF FOR RESPONDENT

St. Louis-San Francisco Railway Company in Opposition

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OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (UTU App. A)[1] is reported at 464 F. 2d 301. The opinion of the original panel (U.S. App. A) is not officially reported. The opinion of the district court (UTU App. B) is reported at 52 FRD 276.

[1] "UTU App." refers to the appendix to the petition of the United Transportation Union in No. 72-393; "U.S. App." refers to the appendix to the United States' brief in opposition to that petition.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* (UTU App. B) was entered on June 13, 1972. On September 7, 1972, Mr. Justin Blackmun, upon application by petitioner, extended the time for filing a petition for a writ of certiorari to and including November 10, 1972. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals, after finding that there was racial discrimination prior to the enactment of the Civil Rights Act of 1964 and that the continuing effect of that past discrimination perpetuates itself, abused its discretion in fashioning a remedy designed to eliminate or reduce the effects of past discrimination and protect safety and efficiency, which said remedy, among other things, allowed black train porters to exercise as brakemen fifty-percent, rather than one hundred percent, of their train porter seniority.

2. Whether, under the facts of the case, the court of appeals abused its discretion in denying back pay as part of the remedy fashioned to eliminate or reduce the effects of past discrimination.

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S C. 2000e, *et seq.* are set forth at pages 2-4 of the petition. The relevant portion of the Railway Labor Act, 45 U.S.C. Section 152 First, is set forth at p. 4 of the UTU petition in No. 72-393.

STATEMENT

This case had its beginning when petitioner filed its complaint on July 24, 1967, alleging a pattern or practice of discrimination by the St. Louis-San Francisco Railroad Company (hereinafter sometimes referred to as "Frisco") involving numerous crafts and invoking jurisdiction of the court under Section 707(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e)-6. The complaint (and an amended complaint filed January 5, 1968) contained no prayer for back pay. This issue was first documented in a post-trial brief filed by petitioner on or about July 28, 1970.

Trial commenced on June 15, 1970, and was concluded on June 16, 1970, during which time the government limited itself to litigation of the train porter-brakemen issue that had been the subject of litigation intermittently over a period of approximately twenty-five years. A record and a discussion of the prior litigation is contained in the decision of the district court (UTU App. pp. A-28-30). On March 9, 1971, the district court determined (1) that service as a train porter did not equip the train porter with the requisite skill and ability to perform a freight brakeman's position in either a safe or efficient manner, and (2) that negro train porters had not been discriminated against since the enactment of the Civil Rights Act of 1964 (UTU App. p. A-42). Accordingly, the district court dismissed the action.

On appeal, a divided panel of the court of appeals affirmed the district court's denial of all relief (U.S. App. A). On rehearing, the court of appeals *en banc* (with three judges dissenting) determined that there was racial discrimination prior to the enactment of the Civil Rights Act of 1964, and that the continuing effect of that past discrimination perpetutates itself. It then

fashioned a remedy involving training and selection stated to provide adequate safeguards for safety and efficiency. The remedy included granting of fifty percent seniority but excluded back pay. The case was reversed and remanded for further proceedings not inconsistent with the court's opinion (UTU App. A).

The craft of train porter had been recognized by the respondent railroad since at least December, 1918; and it had been organized and represented for collective bargaining purposes since 1921. It had always been filled solely by blacks. Train porters and brakemen were always represented by separate bargaining units (UTU App. p. A-3).

The trial court determined as facts "that the primary function of a train porter was that of providing for the care and comfort of passengers" and that "the train porter did (on rare occasions) perform minimal switching work and other minor duties of a brakeman" (UTU App. pp. A-36-37).

Prior to 1928, Negroes were hired as brakemen. In that year an agreement between four train service organizations and Frisco, including the predecessor of the respondent UTU, prohibited the future employment of Negroes in train, engine and yard service except as train porters. This agreement was terminated in 1949, but the first employment of a Negro in those services appears to have been in 1963, when train porter Pogue was employed as a fireman (R. 694).

The district court in a memorandum decision found that "the duties of a train porter and brakeman are essentially different" and that "the crafts of train porter and brakeman are based upon functional differentiations" (UTU App. pp. A 41-42). The court also justified the separate craft classifications on the basis of business necessity (UTU App. p. A 45), finding that train porters

were not qualified by experience to perform the dutes of freight brakemen with safety and efficiency (UTU App. A-42). Judgment was entered for the defendants.

On appeal, a panel of the court of appeals, with one dissent, affirmed. The government's petition for rehearing en banc was sustained and following rehearing the district court, with three dissents, was reversed. The majority held that the failure to grant carryover seniority to train porters hired as brakemen violated Title VII of the Civil Rights Act of 1964. The relief ordered requires Frisco to offer employment as brakemen to all former train porters, to create and implement a training program, providing training for a period of not to exceed six months, with those former train porters who are then found to be qualified to receive seniority as brakemen for 100% of the time spent in training plus 50% of their former seniority as a train porter. Those former train porters now employed as brakemen are to receive 100% credit for time spent as a brakeman plus 50% of their time as a train porter. The seniority granted train porters and brakemen who formerly were train porters shall not be used to force Frisco to assign a former train porter to a job for which he is not qualified, nor to assign more than one former train porter to a crew. Back pay was denied.

ARGUMENT

1. *Introduction.* In the court below the government, after litigation extending over a period of more than twenty-five years, involving essentially the same parties and questions, finally achieved a partial victory. Still unsatisfied, the government is now requesting this court to review an attempt on the part of the court below to finally put to rest this interminable litigation by a decision that seeks to reconcile the differences between the parties in such a manner that, in the opinion of the majority of the court below, will remedy what that court found to be a situation that perpetuates the effect of past discrimination because of color.[2]

That portion of the government's petition for a writ of certiorari under the heading "Reasons for Granting the Writ" omits discussion of the most relevant and important point that must be considered by this court in determining whether the requested writ should be granted; namely, whether the courts have discretion in fashioning an appropriate remedy where it is found that a violation of Title VII of the Civil Rights Act has occurred. The answer to this question is obviously in the affirmative. As was stated in the opinion of the majority of the court of appeals decision on rehearing:

> "In determining an appropriate remedy, courts possess wide discretion in fashioning decrees to secure compliance with the Civil Rights Act of 1964" (Citing **Parham v. Southwestern Bell Telephone Co.**, 433 F. 2d 421, 428, and **United States v. Ironworkers**

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[2] The respondent railroad does not believe that the decision of the court below was correct and it accepts that decision solely for the purpose of this brief in opposition.

Local 86, 443 F. 2d 544, 553, Cert. Den. 404 U. S. 984 (1971) (UTU App. p. A-14).[3]

Thus, the questions presented by the government's petition are not aptly phrased. Rather, the principal question that must be decided by this court, before determining whether or not to grant the petition, is whether the court below, in fashioning what it deemed to be appropriate relief under the facts and circumstances of this case, "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision" (S.C. Rule 19. 1. (b)). In other words, has the court below abused its discretion in the formulation of the remedy set forth in its decision? It is submitted that it has not.

2. *Seniority Issue.* The respondent railroad believes that the court below erred in failing to accept the findings of the district court that the crafts of train porter and brakemen were functionally different, and that the train porters had no greater right to seniority in the brakeman's craft than any of the other thousands of employees of the railroad who were deprived of jobs because of technological advances and the discontinuance of passenger service. Nevertheless, the railroad must face up to the fact that the majority of the court of appeals has held that there is some relationship, albeit not fully explained, that entitles train porters to some seniority preference in periods subsequent to July 2, 1965, within the brakemen's craft, even though safety and efficiency might thereby be affected.[4]

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[3] **Moody v. Albemarle Paper Co.**, 4 FEP Cases 561 (E.D.N.C.) and the cases cited in Footnote 6, infra, also support this conclusion.

[4] The court of appeals' decision indicates its cognizance of the safety and efficiency problem created by its decision by its formulated remedy calling for training and examination of former train porters and by the limitations placed upon the use of the seniority granted, i.e., no more than one former train porter per crew.

The types of remedies fashioned by the courts to rectify what has been determined to be a violation of Title VII are many and various. See cases discussed in **Parham v. Southwestern Bell Telephone Co.**, *supra*, and **United States v. Ironworkers Local 86**, *supra*.

The case at bar involved many factors. Most important is the fact that the court of appeals fully recognized that the experience of a train porter was in no way as valuable as the experience of a brakeman in determining the train porter's qualifications for the exacting and complicated position as brakeman. Therefore, according fifty percent seniority to train porters, rather than one-hundred percent, was an eminently logical means of permitting train porters to find their "rightful place" in the brakemen's craft. None of the cases cited by petitioner holds that it is improper to accord less than full seniority to blacks to correct the effect of past discrimination where the blacks have substantially less experience needed to perform the duties of the craft from which they have been excluded than those who are already members of the craft.

At page 10 of the government's petition, it is stated:

> "The courts of appeals other than the court below have therefore ruled that under Title VII the victims of discriminatory employment practices must be allowed, if they are qualified, to fill vacancies in jobs from which they were formerly excluded and thereafter to use their **full** employment seniority for purposes of all future promotions, demotions, layoffs, recalls, and assignments."

As authority for this statement, petitioner states in footnote 8, page 10, that "In each case cited in note 6, *supra* (pp. 10-11), such relief was ordered or sustained, except in **Bailey v. American Tobacco Co.**, which was decided

at the summary judgment stage, and which did not present the remedy issue."

This brief in opposition obviously is not a proper place to analyze the cases cited in petitioner's footnote 6. Suffice it to say that none of them involved a factual situation such as here involved, and that the question as to whether the injured parties should be granted full, rather than partial, seniority in another craft was not before the court in any of the cases. There is no conflict between the decision of the court below and the decisions of any other circuit.

3. *Back Pay Issue.* In its petition beginning on p. 13, the government makes a weak attempt to convince this court that the decision of the court below with respect to the back pay issue is in conflict with the decisions of other circuit courts. The government prefaces its statement by emphasizing the stated reasons set forth by the court below for denying back pay. However, petitioner not only misstated the reasons given by the court, but also failed to note that the language used by the court indicates that the stated reasons obviously were only some of the factors that the court below took into consideration.[5]

The government cannot and does not contend that an award of back pay after a violation of Title VII is found is not discretionary with the courts. The back pay prob-

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[5] The full text of that portion of the decision of the court below relating to back pay (UTU App. p. A-18) is as follows:

> IV. No back pay will be awarded. In reaching this decision, we have taken into consideration the fact that the train porters (and the Government) took the position that a complete merger of the two crafts was required with full seniority carryover. Since this demand has been denied by this Court, it cannot be said that Frisco acted in bad faith or erred in refusing to voluntarily grant that request. Moreover, it would be impossible to determine on what date those train porters who are now physically unqualified to become brakemen, became physically unable to perform.

lem is well analyzed in **Moody v. Albermarle Paper Co.**, 4 FEP Cases 561, 570 (E. D. N. C.):

> "In addition to injunctive relief, the plaintiffs seek an award of the amount of pay which would have accrued to them had there been no unlawful practices. 42 U.S.C. § 706(g) provides that the court **'may** * * * order such affirmative relief as **may** be appropriate, including reinstatement or hiring of employees, **with** or **without back pay'**. The statute thus speaks clearly in terms of the discretionary power of the court. See Local 186, International Pulp, Sulphite and Paper Mill Workers v. Minnesota Mining and Manufacturing Company, 304 F.Supp. 1284, 1 FEP Cases 764, 71 LR RM 2427 (N.D. Ind. 1969). Robinson, supra (referring to Robinson v. Lorillard Corp., 444 F.2d 791), can be read to hold that back pay is a compensation for a tangible economic loss and that the plaintiff is **entitled** to that compensation. However, the Fourth Circuit was there concerned with the defendant's contention that it was an abuse of discretion to **award** back pay. It did not address itself to the clear statutory language of Section 706(g)."[6]

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[6] Other cases holding that the award of back pay is a matter within the discretion of the courts and denying back pay in whole or in part are **Jinks v. Mayz**, 4 FEP Cases 1074 (CA 5)—(back pay denied where female teacher failed to request reemployment after pregnancy); **Cooper v. Allen**, 4 FEP Cases 1219 (CA 5)—(back pay denied providing city can show by clear and convincing evidence that it would not have hired black golf professional absent a testing requirement found to be discriminatory); **Lea v. Cone Mills Corp.**, 438 F.2d 86 (C.A. 4)—(back pay denied to black female applicants refused employment where there was no showing that defendants hired any female employees, black or white, possessing plaintiffs' education, background, skill and experience at time plaintiff applied for employment or thereafter); **Schaeffer v. San Diego Yellow Cabs, Inc.**, 462 F. 2d 1002 (C.A. 9)—(back pay denied for period prior to defendant's learning of district court decision invalidating state statute forbidding females to work more than eight hours

In footnote 12 of its petition, the government attempts to denigrate the precedent value of some of the cases mentioned in footnote 6 of this brief on the basis that they involved sex, rather than racial discrimination. This is a distinction without a difference. Sex discrimination and racial discrimination cases are governed by the same statutory provisions. The sex discrimination cases fully support the proposition that the award of back pay is dependent upon the facts of the case and a matter to be left to the sound discretion of the courts.[7]

Petitioner urges that there is a reviewable conflict between the decision of the court below and two other circuits "To the extent that the decision below makes an award of back pay under Title VII contingent upon a showing of bad faith conduct by the defendants * * *", citing **Robinson v. Lorrilard Corp.**, 444 F.2d 791 (C.A. 4), and **Bowe v. Colgate-Palmolive Co.**, 416 F.2d 711 (C.A. 7). The proposition that a conflict in the reasoning, rather than the ultimate decision, of different circuits is a basis for granting certiorari is, to say the least, a novel one. In **Robinson**, as stated in the quotation from **Moody v. Albermarle Paper Co.**, *supra*, the court merely held that the lower court did not abuse its discretion in awarding back pay. In **Bowe**, the court affirmed the district court's determination that sufficient proof was adduced to support

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per day and EEOC decision in favor of employes); **Le Blanc v. Southern Bell T. & T. Co.**, 460 F. 2d 1228 (C.A. 5) and **Manning v. Automobile Workers**, 4 FEP Cases 1282 (C.A. 6)—(affirming denial of back pay by lower court where employers in good faith relied on protective state hours of work laws for females later held to be invalid).

[7] In its footnote 12 the government attempts to becloud the issue by reference to Section 713(b) of the Act, which makes reliance upon a published EEOC interpretation a defense to a back pay claim. None of the decisions cited in the footnote were based upon Section 713(b).

an award of damages. **United States v. Hayes Int'l Corp.**, 456 F.2d 112 (C.A. 5), and **Nathanson v. National Labor Relations Board**, 344 U.S. 25, also cited by petitioner, in no way militates against the accuracy of the legal conclusion that an award of back pay is dependent upon the facts of each case and is within the sound discretion of the courts.

We can only speculate as to all of the considerations that impelled the court below to deny back pay in the instant case, other than the two reasons set forth in the decision. Some of these considerations may have been the refusal of some of the plaintiffs on advice of counsel to accept employment as brakemen (UTU App. p. 44) and the determination implicit in the decision of the court of appeals in fashioning its remedy (UTU App. p. 14, et seq.) that the train porters did not, absent training, have the ability to perform the duties of a brakeman. Also, the statement of the court below that it would be impossible to determine on what date those train porters who are now physically unqualified to become brakemen, become physically unable to perform cannot be lightly brushed aside. Of course, as suggested by petitioner, some procedure could be devised in an attempt to overcome this hurdle, but the result would be so highly uncertain and speculative as to be of little value.

There is one other reason that may have been taken into account by the court below when it denied back pay. It is well accepted that an award of back pay, being an equitable remedy, will not be made unless prayed for in the pleadings if the defendant employer or union has been substantially prejudiced. **Robinson v. Lorillard Corporation**, 444 F.2d 791, 803 (C.A. 4); **Moody v. Albemarle Paper Co.**, *supra*, **Rental Development Corporation of America v. Lavery**, 304 F.2d 839, 842 (C.A. 9); **Connolly v. United States**, 149 F. 2d 666, 669 (C.A. 9).

The complaint herein was filed on January 5, 1968, and it contained no prayer for back pay. The issue was first raised in a post-trial brief filed in the district court in July of 1970. Thus, for two and one-half years the defendant railroad, as well as the defendant UTU, had no knowledge that back pay was sought. If it had such knowledge, the railroad perhaps could have intensified its efforts to find other employment for the plaintiffs with a view to mitigating possible monetary loss. The railroad and the union might have pushed for an earlier trial had they known that back pay, from July 2, 1965, was an issue in the case. See **Moody v. Albemarle Paper Co.**, *supra*.

CONCLUSION

The courts have broad discretion in fashioning a remedy for a violation of Title VII of the Civil Rights Act of 1964. The petition for certiorari in no way demonstrates that the court below abused its discretion in fashioning its remedy. There is no conflict between the decision of the court below and the decisions of any other circuit with respect to either the seniority issue or the back pay issue. None of the considerations governing review on certiorari set forth in S.C. Rule 19 are presented by the decision of the court below. The petition for writ of certiorari should be **denied.**

Respectfully submitted

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